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No. 08-101

Supreme Court, U.S.
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In The

Supreme Court of the United States

ELMER VAN GORDER,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's rigorous analysis of the evidence on record and Opinion affirming the District Court's grant of Summary Judgment to Respondent does not conflict with a decision of this Court or a Court of Appeals and where the Petition for a writ is merely an attempt to reargue factual findings made by the trial court and affirmed by the United States Court of Appeals for the Sixth Circuit?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Grand Trunk Western Railroad, Inc. is an indirect subsidiary of Canadian National.

Canadian National is the only publicly held company that owns 10% or more of Grand Trunk Western Railroad, Inc.'s stock.

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STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Elmer Van Gorder filed his Complaint in the U.S. District Court for the Eastern District of Michigan, seeking damages pursuant to the Federal Employers' Liability Act, (FELA) 45 U.S.C. §51 *et seq.* for injuries allegedly sustained on October 17, 2003 when Petitioner, while employed by the Respondent Grand Trunk Western Railroad, Inc. ("Grand Trunk") as a carman or car inspector at the David Road loading docks, in Flint, Michigan, attempted to close the left clamshell door of a bi-level auto carrier railcar, number TTGX985596, and allegedly injured his right shoulder. Petitioner's Complaint alleges that Respondent Grand Trunk was negligent in failing to properly provide Petitioner with a safe place to work, in allegedly failing to keep its equipment and property in a proper and safe manner, in the alleged failure to properly inspect, repair and maintain its equipment and property, and in the alleged failure of the Respondent to comply with applicable Federal and State regulations, including but not limited to 49 CFR §215. (R.1, Complaint, ¶9, pp. 2-3)

While Petitioner pled his claim in negligence, under the FELA, he presented his claim as one sounding in strict liability, arguing essentially that there was a defect in the door of the subject railcar and therefore the Respondent railroad is liable. Respondent filed its Motion for Summary Judgment of Petitioner's complaint in the U.S. District Court on

the basis that the Petitioner's Complaint should be dismissed because there is no evidence that the Respondent had either actual or constructive notice of the defective condition of the clamshell door of the subject railcar prior to the incident in question, which is a necessary element of the Petitioner's negligence claim. (R.11 Motion and Brief in Support of Motion for Summary Judgment and Exhibits A through G)

On September 27, 2006, the U.S. District Court entered its "Opinion and Order Regarding Defendant's Motion for Summary Judgment," granting Respondent's Motion and dismissing Petitioner's Complaint in its entirety, with prejudice. In its Opinion granting Summary Judgment to Respondent, the U.S. District Court held that the Petitioner had failed to make out a claim of negligence. (Petitioner App. B, 25a-27a, 30a)

In its Opinion, the U.S. District Court held that Petitioner's reliance upon 49 CFR §215.9(c) and its strict liability standard or *negligence per se standard* is misplaced and has no application to the facts of the instant case. (Petitioner App. B, 28a-30a) In its Opinion dismissing Petitioner's Complaint in its entirety, with prejudice, the U.S. District Court, in a footnote, noted that Petitioner had attempted to argue at oral argument, based upon the last paragraph of his expert, Mr. Micek's Affidavit, that he can make out a strict liability claim under the Federal Safety Appliance Act (FSAA). The U.S. District Court noted, however, that contrary to Petitioner's assertions, Petitioner had never alleged a violation of the

Safety Appliance Act in his Complaint, but only set forth claims alleging negligence under the FELA. (Petitioner App. B, 31a) Judgment was entered in favor of the Defendant Grand Trunk on September 27, 2006. (R.20, Judgment)

On Appeal of the U.S. District Court's Order, Petitioner made no argument of error in the U.S. District Court's ruling as to the regulations, 49 CFR §215.9(c), having no application to the facts of the case nor did Petitioner appeal the U.S. District Court's holding that the case was not a Safety Appliance Act case nor that Plaintiff had not pled a Safety Appliance Act case. On Appeal to the Sixth Circuit Court of Appeals, Petitioner argued, as he does in this Court, that the lower court erred in dismissing his Complaint arguing there are questions of fact relative to the Respondent's claim of negligence.

The Court of Appeals for the Sixth Circuit conducted a rigorous analysis of the evidence in the record, applying well-established legal standards pursuant to Fed. R. Civ. P. 56(c) and FELA and affirmed the Judgment of the District Court in its grant of Summary Judgment to the Respondent Grand Trunk. The Sixth Circuit Court of Appeals held that Petitioner Van Gorder needed to present evidence sufficient to raise a genuine issue of material fact as to every element of his negligence claim. The Court of Appeals for the Sixth Circuit found that "the fatal flaw in Van Gorder's complaint, . . . is that he cannot show that Grand Trunk was negligent." *Van Gorder v. Grand Trunk Western R.R. Inc.*, 509 F.3d 265 at 269

(6th Cir. 2007), (Petitioner App. A, 7a) The Sixth Circuit Court of Appeals in *Van Gorder* states at 271, (Petitioner App. A, 12a):

> Under FELA, the "test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part . . . in producing the injury." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); *Rogers*, 352 U.S. at 506, 77 S.Ct. 443. If the record contains evidence from which the court could draw the conclusion that the employer's negligence played any part in the plaintiff's injury then it must send the case to the jury, even if the evidence would also allow the jury to find for the employer. *Id.* at 116-17, 83 S.Ct. 659. But a plaintiff cannot benefit from FELA's relaxed causation standard unless he can prove that the employer was negligent in the first place, and this Van Gorder has wholly failed to do.
>
> The record in this case does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door. In the absence of that evidence, summary judgment for Grand Trunk was appropriate. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *see also Hartsel*, 87 F.3d at 799.

B. Statement of Facts

Before detailing the evidence in the record relevant to Petitioner's argument on his Petition for Writ, Respondent must point out that Petitioner's submitted Statement of the Case is inappropriately replete with factual arguments, misstatements and omissions as to the facts on record before the lower court.

Particularly glaring in view of Petitioner's arguments consisting of alleged erroneous factual findings by the lower court, is the omission of facts in the record relative to Grand Trunk's inspection procedures and standards, the post-accident mechanical inspection of the railcar in question and Petitioner's own testimony on these points, which are set forth in detail below. Not only does Petitioner omit relevant, material facts, but to the extent Petitioner states facts, for the most part the facts as stated by the Petitioner are grossly mischaracterized and inaccurate.

The evidence on record supports the lower court's Opinion affirming the grant of summary judgment to the Respondent. The un-rebutted evidence in the case is that there was a defect in the clamshell AR door canopy bolt which manifested itself upon the canopy bolt's failure at the time of the accident. Thus, the first notice to the Respondent of the defect in the railcar was upon the failure of the bolt, when Petitioner closed the door at the time of the incident. Petitioner did not produce any evidence to establish that a routine visual inspection of the door from the

ground or from the top of the roof of the railcar or from any vantage point would have revealed the defect in the AR door canopy bolt, nor was any evidence produced of any alternative allegedly proper method or procedure of inspection which would allegedly demonstrate that the Respondent could have discovered the defect in the railcar upon reasonable inspection, prior to the incident.

1. Railcar Inspection Standards.

The testimony of John P. Jaques, an employee of Grand Trunk for 36 years at the time of the accident in question and the Mechanical Department Supervisor and Technical Officer, Special Equipment, Pool Operations, was presented relative to inspection procedures and standards as well as his personal post-accident mechanical inspection and investigation of the railcar in question. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 4-10) In his position, as Mechanical Department Supervisor and Technical Officer, Special Equipment, Pool Operations, it was Mr. Jaques' responsibility, among other things, to ensure that auto carrier railcars, including bi-levels utilized by the auto industry are in proper and safe condition for use by the auto industry and while being transported by the Respondent railroad on its lines. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 6-8, 10) Mr. Jaques testified that the level of maintenance

and inspection conducted by the Respondent on multi-level auto carrier railcars such as the subject railcar is based upon the Association of American Railroads (AAR) Manual of Standard and Recommended Practices, Appendix B as well as Federal Railroad Administration (FRA) regulations. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7, 12-13, 17-18)

The concept of Pool Operations was explained by Mr. Jaques as a large group of multi-level auto carrier railcars in the industry, such as the one involved in this case. Such railcars are pooled and are distributed to different loading facilities throughout the country by TTX Reload, a trailer train company that operates and has control of the pool of railcars, the goal being to reduce the movement of these cars in the unloaded condition. Part of Mr. Jaques' job duties is to make sure that these railcars on Respondent's line have the maintenance and repairs necessary to keep the cars in proper and safe condition for loading and transit. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 10-14, 6-8)

2. Visual Inspection of Railcars For Patent Defects

Inspections of railcars take place on a continuous basis. There are pre-trip inspections, running gear inspections, inbound and outbound inspections. These

inspections take place in all kinds of weather, throughout the year on a continuous basis. These inspections are for the most part visual inspections. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7-8, 12-13, 17-18, 20, 23-27) On any of these inspections, if an exception is taken to the condition of the railcar the railcar will be repaired on site if possible or bad-ordered and moved to a repair facility, if it cannot be repaired on site. When a railcar is bad-ordered the car is tagged and sent to the repair track for repairs. Paperwork will be generated for the railcar as to any bad-order conditions. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 17, 28-29; R.11 Defendant's Motion for Summary Judgment, Exhibit C, Deposition Robert F. Miller, pp. 7-8)

On every trip, including pre-trip, whenever a train is made up, a basic running gear inspection would be performed. A running gear inspection would include a visual review or inspection, "for the most part . . . [of] everything below the first deck of the car; the coupler, the wheels and things of that nature." Whenever a train is made up, those components are reviewed to make sure that they are in federally mandated condition. Some inspection procedures, especially with running gear and anything federally regulated by the FRA are more stringent and defined. The running gear inspection is done either prior to or during the pre-trip inspection. (R.14 Defendant's

Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 12, 18, 24)

All railcars, including multi-levels, get inbound and outbound inspections. A pre-trip inspection can happen both before, during or after the inbound inspection. Mr. Jaques testified that in the Bristol Yard facility in Flint, Michigan, for the most part, the inbound inspection occurs at the same time as the pre-trip inspection. An inbound inspection would include, primarily, a review of the wheels, the rolling and running gear, the couplers and safety appliances to make sure that all railcars are in safe condition while being transported on Defendant's line. Mr. Jaques testified that a carman never has to get on top of the railcar to inspect a railcar during a pre-trip inspection, inbound or outbound inspection. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 23-25, 17, 25)

3. Pre-Trip Inspection Prior To Loading of Multi-Level Railcars.

Prior to loading of the multi-level railcars, a pre-trip or "prep repair and review" inspection takes place. This pre-trip inspection can take place prior to or at the actual loading dock. During a pre-trip inspection a visual inspection of the outside of the railcar will be made to determine whether there is any visible defect or exception to be made to the car.

(R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7-9, 12-13, 19-20, 42) A pre-trip inspection includes opening the doors of the railcar to determine whether any lubrication, cleaning or any repair is needed. The carman, while opening the doors will look for any problems that might be evident with the tracks, rollers and other components associated with the door as well as with the safety appliances that are located on the doors, to assure that everything is intact and is functioning properly. Once the door is open, inspection of the tie-downs would be made to determine if they were of specification that would be acceptable for the product to be loaded and a review of the exterior of the car would be made to make sure that the protection devices, side screens, ladders and other items are intact. Mr. Jaques testified that there are a multitude of items that would be inspected at the pre-trip inspection. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 7-9, 12-13, 19-20, 42-43)

The purpose of opening the doors at the pre-trip inspection is to get the car ready to load vehicles and for inspection. Mr. Jaques explained that the door, once opened, would not have to be closed at the pre-trip inspection because the car is being made ready for loading. There would be no reason to triple the work for the individual by opening the door, closing the door and then reopening it again to make it ready for loading. Mr. Jaques testified that carmen are

pretty knowledgeable and are able to recognize if there is an impediment or some problem with the door when opening the door. If the door hung up when opening on the pre-trip one might try to close it in order to figure out what was wrong with the door or if there was a problem with the door when opening it one would look at the door further to determine what was wrong with the door. However, if there were no problems with the door, for example it did not hang-up or was not out of alignment and there did not appear to be an issue and no exception was taken to the door, one would not have to close the door at the pre-trip. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 15, 42-44)

After the pre-trip inspection in the Bristol yard in Flint, the cars are then moved to the David Road GM facility and placed in groups of four or five depending on the quantity of loading that particular day. If the multi-level railcars have not been pre-trip inspected the doors on the cars will be closed. If the cars are not pre-trip inspected or prepped at Bristol yard, then the cars would be pre-trip inspected or prepped at the loading dock. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 14, 18-19)

4. Car Inspection Procedures At David Road Loading Docks Where Incident Occurred. -

The GM plant at David Road in Flint, Michigan produces only trucks and SUVs, therefore, all auto carriers delivered at David Road for loading are bi-level railcars. Carman Doug Haskins, with whom Petitioner has worked on the day job at David Road for the three years prior to the subject incident, was Petitioner's crew member, working with Petitioner on the day of the subject incident. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27, 37, 35-36, 53)

Petitioner testified that bi-level auto railcars are delivered on the midnight shift or early in the day shift at David Road and spotted along the loading docks. The David Road loading docks have six tracks, each with the capacity of five bi-level cars. Petitioner explained that normally the cars are delivered at David Road with the doors locked open, because the cars have been pre-inspected and prepped at the prep track at the Bristol Yard in Flint. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27-28, 33, 65, 67; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 14-17)

At the David Road loading docks, it was the job of Petitioner Van Gorder and his crew member, Doug Haskins to put in bridge plates between the bi-level

cars on the A and B decks of the railcars to enable the loading of all five railcars on the six tracks at the dock. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27-28, 54; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 18-19)

Petitioner testified that there were times when the bi-level railcars, being in such demand, would arrive at the David Road loading dock without having been previously prepped and inspected. Mr. Van Gorder testified that it would be obvious which cars had not been inspected and prepped, because the doors on those railcars would be closed. If the railcars had not been inspected and prepped, it would then be Petitioner's and his crew member Haskins' job to open the doors on the cars and inspect the A and B deck for safety appliances, chocks, broken straps, etc., prior to placing in the bridge plates for loading. The actual loading of the cars would be performed by GM and/or its contractor. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 27-28; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 18-19)

Once the railcars are loaded by GM and/or its contractor, Petitioner and his crew member Haskins would then inspect the cars to insure they were properly chocked and strapped down. Then Petitioner and crew member Haskins would remove the bridge plates and close the railcar doors. (R.11 Defendant's

Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 12; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 21-22)

Normally, this would proceed by the A deck carman taking down the bridge plate on B deck and then unlocking the doors from their opened, locked positions and moving the door approximately 8 to 10 inches so that it was ready to be closed. The A deck man would then get down on the ground and remove the A deck bridge plate and close doors if this was not already accomplished by the other carman. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 46; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 21-22)

5. Incident of October 17, 2003.

Petitioner Van Gorder reported for work at the David Road yard shortly before the start of the shift at 7:00 AM on October 17, 2003. The docks were loaded with railcars and some of the railcars had already been loaded with GM trucks and SUVs, with the doors closed. Petitioner testified that most of the railcars had been pre-inspected at the prep track at the Bristol Road yard, as the doors of the railcars were locked open. (R.11 Defendant's Motion

for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 53-54, 50)

Petitioner Van Gorder stated that on the day of the incident, he and crewmember carman, Haskins, worked in their normal manner, as described above. Petitioner and crew member Haskins were working on No. 4 track. They had inspected and removed bridge plates up to the No. 4 car. Petitioner could not recall how many railcars he had inspected and closed doors, prior to his injury. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 53-54)

Petitioner testified that his injury occurred at approximately 12:15 PM. Petitioner recalls that carman Haskins was walking ahead of him on the B-deck in the next or even perhaps the fifth car in Track No. 4. It was Petitioner's belief that carman Haskins had previously unlocked the open doors on railcar TTGX985596 and had them ready to close. Petitioner testified that he believes he had just completed inspecting the A-deck of the same railcar when he got down to close the doors. Petitioner was facing the A-end of railcar TTGX985596 (A-end opposite of the [brake end] of the car) and as he was facing the left clamshell door, he attempted to close the door, pulling from left to right. While attempting to close the left clamshell door he grabbed the door in his normal fashion with both hands at approximately chest level. Petitioner testified that the door initially moved freely and with no resistance. After moving the door to within approximately one and one-half to two feet

of it being closed, the door suddenly and without warning completely stopped. Petitioner stated that the door stopped so suddenly that his forward momentum caused both of his hands to slip off the end of the door and he nearly fell down. Petitioner testified that he felt a sharp pain in his right shoulder as well as in his fingers. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Petitioner, pp. 61, 64-66, 73-74)

6. Subject Railcar Was Pre-Trip Inspected – No Defects Noticed.

Petitioner did look into the track at the base of the door and could see no obstruction or anything which would have caused the door to hang up in the fashion that it did. Petitioner testified unequivocally that he did not inspect the doors of this railcar prior to attempting to close them because it had already been prepped at the prep track at Bristol Yard. Petitioner also testified that while he has experienced doors becoming "hung up" and "difficult" to close on prior occasions, he had never experienced a door becoming "hung up" as it did at the time of this incident. Petitioner testified that normally, a carman knows that he's going to have trouble with a door as soon as he attempts to open or close it, explaining that the door does not move freely, but has a problem with the movement, which is immediately noticed. In this case, on the day of the subject incident, the door of railcar TTGX985596 appeared to be moving freely and in good fashion until, without warning, it

stopped. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 113-114, 76; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 15, 43-44)

7. Post-Accident Investigation And Mechanical Inspection of Railcar TTGX985596 At The Repair In Progress (RIP) Track.

Subsequent the incident, railcar TTGX985596 was taken by the switch crew to the RIP (repair in progress) track in Flint, for mechanical inspection of the railcar. At 3:30 PM on October 17, 2003, Robert F. Miller, Car Foreman at Flint RIP track performed an inspection of the railcar along with John P. Jaques, Mechanical Department supervisor and Technical Officer – Pool Operations, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey and Risk Mitigation Officer David Cromie. (R.11 Defendant's Motion for Summary Judgment, Exhibit C, Deposition of Robert F. Miller, p. 13; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 30-34)

Initially, Mr. Miller and Mr. Jaques were unable to determine any problem with the railcar door. Inspection of the railcar from the ground level, reviewing all of the components of the door revealed nothing; there was nothing to which exception could be taken. Everything looked fine from the ground.

The mechanical inspection/investigation revealed that the AR door on the railcar was able to be opened without problems. The defect in the door manifested itself only in closing the door, by stopping, before it was able to be fully closed. The door operated properly when being opened. After a thorough investigation including being elevated over the top of the roof of the railcar in a man lift bucket, inside the repair facility Mr. Jaques deduced that the shaft of the AR door canopy bolt, which is situated between the canopy and the roof and which is not visible from any vantage point, was worn or damaged. (R.11 Defendant's Motion for Summary Judgment, Exhibit C, Deposition of Robert F. Miller, pp. 14-17, 23, Exhibit F, Mechanical Inspection Report, Exhibit G, Photographs of the car and bolt, taken upon mechanical inspection; R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 34, 37-40, 46-47)

At his deposition, Mr. Jaques explained the mechanics of the clamshell door and of the top canopy bolt and how the determination was made, based upon mechanical inspection of the railcar in question, that the AR door top canopy bolt was worn. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, Deposition J. Jaques, pp. 30-47) The railcar in question has two clamshell or radial doors. The door is attached to the roof and has a bottom roller upon which the door rides and which bears all of the weight of the door.

The door pivots at the center point, which is called the canopy. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 34) The canopy bolt looks like a flathead bolt with an Allen wrench or hexagon type hole in the top of the bolt. The bolt goes through the canopy and the roof. On the underside of the bolt there is a castle nut and a cotter pin inserts into a hole in the bottom of the bolt, which retains the nut and acts like a positive lock-nut, so that the bolt doesn't fall off. The bolt itself, *sits inside* of a large contoured washer, which looks like a bowl or a plastic cup or a sleeve and *which sits into an indentation in the canopy on the roof of the railcar*. Thus, the canopy bolt goes through the roof and the canopy. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40)

As stated previously, Mr. Jaques reviewed all of the components of the door from the ground and could find nothing to which he could take exception. When he opened the door there was no problem and he suspected nothing would happen when he closed the door, but the door would just stop in the movement when being closed. Mr. Jaques testified that there was nothing to indicate that there should have been any problem with closing the door; from the ground and looking underneath the canopy bolt he was able to see that the castle nut and cotter-pin was in place and intact. (R.14 Defendant's Reply Brief to

Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 46-47)

Mr. Jaques wanted to determine whether the canopy bolt was intact, so he got into a man lift bucket and was elevated overtop of the railcar in order to view the canopy and the top of the canopy bolt. Mr. Jaques testified that *even from the man lift, he was unable to see any problem or defect with the door or with the bolt,* because you "can't see where the bolt was worn or damaged" *because the wear on the bolt or the damage to the bolt is "sandwiched," in this case, between the canopy and the roof, at that joint, so it is not visible from any vantage point*, either from the ground, or from the top of the roof. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 46-47) Based upon his inspection and investigation, Mr. Jaques determined that the shaft of the bolt itself, located between the roof and inside the contoured washer of the canopy, "could have been worn, damaged, cut into" which, during the rotation of the bolt, during the closing of the door, caused the door to suddenly stop. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 42)

Mr. Jaques explained that the bolt was not removed at the time of the mechanical inspection/investigation because the railcar was loaded with vehicles. Mr. Jaques testified that the car was shipped to destination with large stickers on the side of the car stating "Home Shop" and stickers letting

everyone know "Be careful opening and closing this door. And it's got to be repaired," after the unloading of the railcar. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 41-42)

Thus, Mr. Jaques explained that the defect was only obvious upon failure of the bolt, when the movement of the door stopped upon closing the door. *The worn or damaged bolt could not be seen from the ground or from the top of the roof or above the roof in the man lift.* (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 46-47) Being elevated above the railcar in the man lift allowed Mr. Jaques to determine that the bolt was fully intact; enabling him to determine that the shaft of the bolt itself was damaged. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 46-47)

Mr. Jaques testified that there are ladders on all four corners of the railcar which go up to the roof rail or rail plate. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 27) Even though a carman could go up the railcar ladder safely, Mr. Jaques stated "it's not promoted" to go up that high on the ladder in order to attempt to see into the center of the railcar to where the canopy is located, which is five (5) or six (6) feet away from the side ladder, where the canopy bolt sits in a depression in the canopy on the rooftop. (R.14 Defendant's Reply Brief to Plaintiff's

Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 42)

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Correctly Applied The Evidence In The Record To Well-Established Legal Standards Relative To Judgment As A Matter Of Law Pursuant To Fed. R. Civ. P. 56(c) And The FELA, 45 U.S.C. §51, In Its De Novo Review Affirming The District Court's Grant Of Summary Judgment To Respondent

A. Petitioner Fails To Present Any Conflict In The Decision Below And Any Decision of this Court or of a Court of Appeals and Has Not Met His Burden of Demonstrating Compelling Reasons For The Petition to be Granted.

Petitioner argues that the Court of Appeals for the Sixth Circuit's decision affirming the order of summary judgment in favor of Respondent Grand Trunk is in conflict with another Sixth Circuit decision, *Aparacio v. Norfolk & W. Ry.*, 84 F.3d 803 (6th Cir. 1996) with respect to the standard governing the quantum of evidence a plaintiff in a Federal Employer's Liability Act (FELA), 45 U.S.C. §51 *et seq.*, case must present, being more than a scintilla of evidence, in order to withstand a motion for judgment as a matter of law. While having made this statement, Petitioner does not set forth the manner in

which the law or legal analysis of the lower court is in conflict with *Aparicio*. Petitioner also claims that the lower court's decision in *Van Gorder* is in conflict with "opinions of the Supreme Court," without stating the decisions of this Court which he claims conflict with the lower court's decision in this case. No further elaboration of the alleged conflict in the decision below or any decision of this Court or of a Court of Appeals is provided to this Court by Petitioner in the Petition.

Petitioner goes on to argue, in essence, the importance of the right to a trial by jury and that the Sixth Circuit's decision in Van Gorder was in error in holding that Petitioner presented no evidence from which a jury could find that the Respondent Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railroad cars or that its method of pre-trip inspection of the cars was unreasonable and that Petitioner had failed to present evidence that the Respondent Grand Trunk was negligent and thus, granting judgment in favor of the Respondent as a matter of law, pursuant to Fed. R. Civ. P. 56(c). Petitioner argues that the lower court's finding that there was no genuine issue of material fact for a jury regarding the reasonableness of Grand Trunk's inspection "puts this decision in conflict with *Aparicio* and other Sixth Circuit cases" and hysterically argues the lower court's finding that the record did not contain sufficient evidence to go to a jury "establishes a new non-jury standard under the FELA" (Petition p. 9, 14) It is apparent that the

Petitioner is begging for a factual reanalysis of the case, while attempting to disguise his plea as a legal dilemma.

Two courts have reviewed all of the evidence in the record and have held that the evidence of record in the case at bar is insufficient to preserve a genuine issue of material fact relative to an element of Petitioner Van Gorder's claim that Respondent Grand Trunk was negligent in its inspection of the car door. Unsatisfied with this outcome, Van Gorder has Petitioned this Court for review arguing that the lower court is in error in its factual finding that "Van Gorder has not presented evidence and the record does not contain evidence sufficient to permit a reasonable jury to find" Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railcars or that its method of pre-trip inspection of the cars was unreasonable. An analysis of the Petition does not reveal any law or argument demonstrating that the lower court's decision is in conflict with the decision of another United States court of appeals on the same important matter nor does the Petitioner claim that the Sixth Circuit's ruling implicates an important federal question that has not been settled by this Court. Sup. Ct. R. 10.

Petitioner is asking this Court to conduct a *de novo* review of the evidence on record, as the lower court did. The Petitioner's argument goes only to alleged errors in the factual findings of the lower court. It is Respondent's position that the lower court, after having conducted a rigorous analysis of the

record as demonstrated by its Opinion, *Van Gorder, supra,* (Petitioner App. A, 1a-13a), has correctly applied well-established law to the evidence on record in this case and has not committed any error in affirming the grant of summary judgment in favor of the Respondent. Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted by this Court as Petitioner's argument is, at best, a claim of error by the lower court in its factual findings or application of properly stated rules of law. Sup. Ct. R. 10.

B. The Evidence On Record Is Not Sufficient to Preserve A Genuine Issue of Fact Material To An Essential Element of Petitioner's Claim of Negligence; Namely, that Respondent Was Negligent In Its Inspection of The Door Of The Railcar.

Petitioner makes the same arguments on Petition as he did in the lower courts relative to the sufficiency of the evidence on record.

1. The Lower Court Reviewed All Of The Evidence In The Record Including The Petitioner's Testimony And Arguments In Addition To The Affidavit Of Michael Micek And Correctly Held The Evidence Insufficient To Permit A Reasonable Jury To Find Grand Trunk's Method Of Pre-Trip Inspection Of The Cars Unreasonable.

Petitioner argues the lower court erred because it did not consider all of the evidence in the record claiming that the lower court chose to overlook or mistakenly ignored the testimony of the Petitioner when making its determination that there was no genuine issue of material fact to be decided by the jury on an essential element of Petitioner's claim of negligence. Petitioner's argument is without merit. Petitioner argues as he did in the lower court: 1) there is a question of fact as to whether the pre-trip inspection took place; 2) that the testimony of the Petitioner created a question of fact with respect to pre-trip inspection procedures arguing that Petitioner's testimony stands for the proposition that "opening and closing of the clamshell doors was customary in inspecting railcars"; and 3) argues Grand Trunk's failure to require the closing of the doors at the pre-trip inspection made the pre-trip inspection unreasonable.

All of the evidence on record, including the testimony of the Petitioner establishes that the pre-trip inspection took place. As set forth in the Statement of Facts, Respondent's employees, Petitioner's supervisors, Mr. Miller and Mr. Jaques, as well as Petitioner, testified as to the Respondent's inspection procedures and standards in the normal course of the Respondent's business at the Flint yard and loading docks at issue. Petitioner also testified that at the time of the incident that the railcars had been pre-inspected with the doors locked open. If the doors had not been pre-inspected with the doors locked open, he would have performed the pre-trip inspection on the railcar at the loading docks, which Petitioner testified was not necessary on the day of the incident, because the pre-trip inspection had taken place. (R.11 Defendant's Motion for Summary Judgment, Exhibit B, Deposition of Plaintiff, pp. 67, 27-28) Petitioner did not present any evidence to rebut Petitioner's testimony that the railcar in question had been pre-inspected prior to being delivered to the loading dock where Petitioner was working at the time of the incident.

The argument that Petitioner's testimony with regard to pre-trip inspection procedures created a question of fact, asserting that Petitioner's testimony stands for the proposition that "opening and closing of the clamshell doors was customary in inspecting railcars" is a misleading and inaccurate characterization of the Petitioner's testimony when viewed in its entirety. Petitioner testified that there were times

when the bi-level railcars would arrive at the David Road loading dock without having been previously prepped and inspected, as the doors on the railcars would be closed. If the railcars had not been inspected and prepped it would then be Petitioner and his crew member's job to perform both the pre-trip inspection, which would require them to open the doors on the railcars and inspect the cars, as well as their usual inspection after the cars were loaded by GM and/or its contractor, which would require inspection and closing of the railcar doors. Thus, in performing both of these functions Petitioner is *opening and closing* the doors. Petitioner has not testified that it was the custom and procedure on a pre-trip inspection to open the closed door, then close the door and then open the door once again in preparation for loading of the car.

In addition, the un-rebutted evidence in the record is that there was a defect in the door in question which manifested itself upon the canopy bolt's failure at the time of the accident. Thus, the first notice to the Respondent of the defect in the railcar was upon the failure of the bolt, when Petitioner closed the door at the time of the incident. Assuming arguendo that the pre-trip inspection included opening the closed doors, then closing the doors and then opening the doors once again, in preparation for the cars to be loaded, as Petitioner argues, this does not create a question of fact or dispute of fact as to the Respondent's actual or constructive knowledge of the defect in the door prior to the incident. It does not demonstrate that Respondent could have discovered

the defect in the railcar upon inspection, prior to the incident.

Contrary to Petitioner's argument, all of the evidence, including these issues and testimony was addressed by the lower court in its Opinion. The lower court did not choose to overlook or mistakenly ignore the Petitioner's testimony on this point, as Petitioner suggests. Plainly Petitioner has not thoroughly reviewed the lower court's Opinion, since Petitioner claims the lower court "inexplicably" failed to mention Petitioner's testimony in its decision. The lower court analyzed the entire record and spoke to these points, *Van Gorder, supra,* at pp. 270-271, (Petitioner App. A, 11a-12a) and correctly held as follows:

> Van Gorder next claims that Grand Trunk merely had to close the door to discover the defect; that closing the doors during the pre-trip inspection would be very easy for Grand Trunk; and that failure to do so made the pre-trip inspection unreasonable. We need not decide what might be easy for the railroad, nor need we indulge Grand Trunk's hypothetical assertions that, in this case, closing the door during the pre-trip inspection might simply "have provided us with a different plaintiff." We must decide only whether Grand Trunk conducted a reasonable inspection and exercised ordinary care. Van Gorder has not presented evidence and the record does not contain evidence sufficient to permit a reasonable jury to find that

Grand Trunk's failure to require closing the door as part of the pre-trip inspection of the car made that inspection unreasonable.

Jacques testified that the pre-trip inspectors would ordinarily recognize a problem with the door upon opening it. Van Gorder himself testified that he had never encountered a door with a defect like the one in question, and that if a door were going to be defective, he "would usually know in the first few inches" of closing it. Van Gorder agreed that the door in question was unusual, and he presented no evidence that Grand Trunk knew or had reason to know of the particular defect in the door or that such a defect would cause the injury Van Gorder sustained. In short, Van Gorder presented no evidence from which a jury could find that Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railroad cars, or that its method of pre-trip inspection of the cars was unreasonable.

2. The Lower Court Correctly Found The Affidavit Of Michael Micek Provided No Specific Information To Explain Why Grand Trunk's Inspection Was Not Reasonable And Provided No Evidence To Dispute Grand Trunk's Specific First-Hand Testimony That The Defective Bolt Was Not Visible From Any Angle.

Petitioner next argues that the lower court erred in not considering his expert witness Michael Micek's "vast experience and qualifications" as an expert, as set forth in his affidavit, and claims that the Respondent did not challenge Mr. Micek's credentials. While Mr. Micek may well have vast experience and qualifications as an inspector and equipment supervisor for the Federal Railroad Administration, the record was devoid of any evidence that Mr. Micek has any personal knowledge of: the type or design of the railcar in question, the mechanics of the door of the subject railcar, or of the canopy on the roof of the railcar, and/or the canopy bolt, or even as to the size of the railcar. There is no foundational support in the affidavit of Mr. Micek on any of these points nor is there any foundational support to indicate that Mr. Micek had ever examined the railcar in question or an exemplar railcar. Respondent challenged the affidavit of Mr. Micek on all of these points in the lower court.

The lower court's reference to Michael Micek as a "purported expert" in this case goes to the heart of his

qualifications to testify regarding the specific issues as to the subject railcar and is not a credibility determination. It was not error for the lower court to find that Mr. Micek's affidavit did not create a question of fact for the jury on the issue of Respondent's negligence.

Petitioner further argues to this Court, as he did in the lower court, that Mr. Micek, in his Affidavit, Paragraph 9, opines that an inspection of this car could have been done without the use of a manlift and that the Defendant could have climbed the side ladder to the very top in order to view the top of the AR door canopy bolt. (R.13 Plaintiff's Response Brief in Opposition to Defendant's Motion for Summary Judgment, Exhibit G, Affidavit of Michael Micek, pp. 2-3) In the first place, as set forth in the Statement of Facts, Mr. Jaques testified that the manlift was used inside the repair facility in order to view the top of the canopy bolt in order to determine whether the canopy bolt was still intact. There is no evidence in the record that a manlift was used for inspection of railcars outside of the repair facility. This statement by Mr. Micek does not go to the Respondent's inspections prior to the incident.

Secondly, the fact that one can possibly climb the side ladder of the railcar to the very top in order to attempt to view the top of the canopy bolt on the railcar, again, does not create a question of fact or dispute as to the inspection procedures and standards used by the Defendant at the time of the incident, nor does it create thereby a question of fact as to whether

the Defendant knew or should have known of the defect in the canopy bolt prior to the incident in question.

As set forth in the Statement of Facts, the testimony of Mr. Jaques was that even having viewed the top of the canopy bolt from a manlift, elevated above the roof of the railcar, inside the repair facility, he was unable to see any problem or defect with the door or with the canopy bolt. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 45-47) Thus, even if one did climb to the top of the ladder up to the roof, in order to attempt to view the top of the canopy bolt on the roof of the railcar, it would *not* have revealed the defect in the canopy bolt as occurred upon the facts of this case. Mr. Micek's Affidavit does not create a question of fact on any of these points, contrary to Petitioner's argument.

Petitioner also argues to this Court as he did in the lower court, that the testimony of Mr. Jaques confirms Mr. Micek's alleged assessment in his Affidavit that "if the car inspectors had gone on top of the roof, they would have also noticed this defective bolt." This argument is a blatant misrepresentation of Mr. Jaques' testimony. Mr. Jaques testified that he was unable to see any problem or defect in the canopy bolt when elevated in the manlift above the roof or from the ground level or from any vantage point. (R.14 Defendant's Reply Brief to Plaintiff's Response to Motion for Summary Judgment, Exhibit H, J. Jaques, pp. 37-40, 45-47) Contrary to Petitioner's argument,

Petitioner has not presented any evidence that the defect in the door at issue could have been detected through "alternate means" nor does Mr. Micek's affidavit create questions of fact regarding any proposed allegedly proper means and methods of the prior inspections.

The lower court properly held the Affidavit of Michael Micek does not present any evidence that the Defendant knew or should have known of the defect in the subject railcar prior to the incident. In its Opinion, the lower court notes that the Affidavit makes only conclusory statements and does not set forth any counter standard or method or procedure by which the Defendant's conduct is to be measured.

Petitioner argues that the conclusory statement of Paragraph 7 of Mr. Micek's Affidavit that had the Respondent "conducted thorough and proper inspections of said car, it should have discovered that the AR door top canopy bolt on car TTGX985596 was defective as it was worn," stating that wear and tear occurs over time and does not spontaneously occur. Similarly, in paragraph 9 of Mr. Micek's Affidavit he states conclusorily that the Respondent "Grand Trunk knew or should have known prior to Mr. Van Gorder's accident that the subject car TTGX985596 was defective." These conclusory statements by Petitioner's expert in his Affidavit do not present any evidence that the Respondent knew or should have known of the defect in the clamshell door canopy bolt prior to the incident in question. The conclusory allegations in Mr. Micek's Affidavit do not go beyond

the mere allegations of the complaint and must be disregarded in determining a motion for summary judgment. *Zenith Vinyl Fabrics Corp. v. Ford Motor Company*, 357 F.Supp. 133, 138-139 (E.D. Mich. 1973),

The lower court in analyzing the points raised by Petitioner on his Writ relative to the affidavit of his expert witness Michael Micek correctly found:

> In attempting to prove that Grand Trunk's pre-trip inspections were unreasonable, Van Gorder relies almost exclusively on the sworn affidavit of his purported expert, Michael Micek ("Micek"). But Micek did not inspect the door of the railroad car at issue, nor does he state in his affidavit that he has any particular familiarity with either the type of car or the type of door at issue. He fails to point to any standard of care to which Grand Trunk failed to conform and he does not explain what kind of inspection would have been reasonable. Micek's affidavit simply makes the conclusory statement that Grand Trunk did not act reasonably because in its pre-trip inspections, it did not discover the defective bolt.
>
> Van Gorder first claims that Grand Trunk would have discovered the defect if it had viewed the door from the roof of the railcar. In his affidavit, Micek claims that Grand Trunk employees could have climbed the ladder on the side of the rail car to its "upper most height" and seen the defect in the bolt. But Micek did not actually see the car, or

> climb the ladder. Jacques – who personally inspected the car – testified at his deposition that he could not see the defect in the bolt either from above the car or from the ground below. * * *
>
> Most significant here, however, was Micek's inability to explain what would have constituted a proper inspection. Micek provided no specific information to explain why Grand Trunk's inspection was not reasonable. He provided no evidence to dispute Grand Trunk's specific, first-hand testimony that the defective bolt was not visible from any angle, and that to observe the defect, Grand Trunk had to take the door apart. Van Gorder cannot raise a genuine issue of fact regarding the reasonableness of Grand Trunk's inspection by suggesting that it should have used a different method to perform the inspection, when the method he advocates would not have revealed the defect that led to his injury.

Van Gorder at 270 (Petitioner App. A, 9a-11a)

The lower court did not err in finding that the evidence in the record was not sufficient to "preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door." *Van Gorder* at 271, (Petitioner App. A, 12a) Petitioner has failed to establish that the lower court has made erroneous factual findings. Petitioner has not met its burden pursuant to Sup. Ct. R. 10 of demonstrating any

"compelling reasons" for the Petition to be granted by this Court.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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